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IN THE SUPREME COURT OF ARKANSAS

No. 9297

HERBERT STITH, ET AL.,

Appellants,

v.

ED PINKERT, ET AL.

Appellees.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Arkansas entered in this cause.

Opinion Below

The opinion of the Supreme Court of Arkansas is not reported as yet in the official Arkansas Reports, but, is reported in The Law Reporter, Vol. 92, No. 16, page 642. A copy of the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix A. A copy of the Motion To Rehear and the order of the Supreme Court of Arkansas denying rehearing are attached hereto as Appendix B. The Chancery Court of Pulaski County, Arkansas, did not render an opinion, but, did render a

decree, and a copy of said decree, findings of fact, conclusions of law and judgment are attached hereto as Appendix C.

Jurisdiction

The judgment of the Supreme Court of Arkansas was entered on November 13, 1950. The order of the Supreme Court of Arkansas denying rehearing was entered on December 11, 1950. A petition for appeal is presented to the Supreme Court of Arkansas herewith, to-wit, on December 29th, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2).

This cause was brought to recover the lands of appellants due to the sale of same under a foreclosure decree in proceedings where Sewer Improvement District 94 foreclosed and sold said lands without making James H. Stith, the owner of said lands, a party to the proceedings and without notice to him under authority of Act 207 of 1937, Acts of Arkansas, which provides that it is immaterial if an incorrect allegation of ownership is made in the proceedings and for constructive service as against residents of the State of Arkansas. The federal question was first raised by plaintiff-appellants in their complaint in the Chancery Court of Pulaski County, Arkansas, (R. 2-10 incl.) where they specifically set up that Act 207 of 1937, Acts of Arkansas, is unconstitutional being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States (R. 8). It was also alleged in the complaint as follows: "That at the time that said foreclosure suit was filed in 1935 the law required personal service to be had upon defendants and owners of the property situated in Improvement Districts. That Act 207 of 1937, upon which attempted service was had in said suit, being passed two years after the suit was filed, did not apply

to said suit, said Act is not retroactive and that service should have been had in accordance with the law at the time said suit was filed. That said Act 207 of 1937 is also unconstitutional, being in violation of due process clause of the 5th and 14th Amendments to the Constitution of the United States. An attempted service under that Act is also void as being in violation of the Constitution of the United States" (R. 8). The questions being that in addition to the Act 207 of 1937, Acts of Arkansas, itself being void as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States, that its application to the case at bar was also in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Said Act 207 of 1937 changed the basic nature of the proceedings from one not in rem to one in rem. These federal questions were pursued by plaintiffs-appellants in every step of the proceedings. The Supreme Court of Arkansas in passing upon these questions expressly held that Act 207 of 1937 in its opinion was valid and that said Act did not violate the due process clause of the Constitution of the United States and that under said Act 207 of 1937, Acts of Arkansas, that the incorrect allegation of the ownership of the lands in the foreclosure proceedings in the case at bar was immaterial and that said Act applied to the case at bar even though it made such proceedings an action in rem and even though said Act 207 of 1937 was enacted after the proceedings for foreclosure in the case at bar had commenced (Appendix A). These same federal questions were again urged and insisted upon in the Motion for Rehearing, filed in the Supreme Court of Arkansas, which was denied (Appendix B).

It was alleged in the complaint of appellants that the complaint, in the proceedings where appellants lands were fore-

closed and sold, named *Smith* as the owner of said lands, that the warning order named *Smith*, and that the decree named *Smith* as the owner, that the notice of the sale of said lands did not name anyone as the owner of said lands and did not sufficiently describe the lands to be sold, that the Board of Improvement of Sewer Improvement District 94 (a defendant in the case at bar) full well knew that *James H. Stith* was the owner of said lands and knew his correct address in the City of Little Rock, Arkansas, and yet at no time was he made a defendant to said proceedings. (R. 6-7). The federal question was raised immediately following and was part of aforesaid allegation in the complaint and was worded as follows: "Notice to *Smith* is not notice to *Stith*, and suit against *Smith* is not binding upon *Stith*, who was never made a party defendant; that said want of notice and not being made a party defendant in said suit constitutes the taking of the property of the plaintiffs herein without due process of law and in violation of the 5th and 14th Amendments to the Constitution of the United States and said sale and title of Ed Pinkert and Manie Schuman should be cancelled and set aside" (R. 7-8). The Supreme Court of Arkansas in considering these federal questions held that the naming of *Smith* instead of *Stith* in the complaint and warning order did not render void the foreclosure decree of the Chancery Court of November 23, 1937 and gave the reason for such holding as being that under Act 207 of 1937, Acts of Arkansas, that it was immaterial that the ownership of the lands was incorrectly alleged in the proceedings. The Supreme Court of Arkansas further held that it was immaterial and unnecessary, under said Act 207 of 1937, that the owner of the lands to be sold be named in the notice of the sale of same and that any insufficiency in the description of the lands in said notice of the sale was cured by the decree of the Chancery

Court confirming the sale. The effect of the holding of the Supreme Court of Arkansas being that a person's land can be foreclosed upon and sold without any notice whatsoever to him (Appendix A). This same federal question was again raised in the Motion To Rehear which rehearing was denied by the Supreme Court of Arkansas (Appendix B). The validity of Act 207 of 1937, Acts of Arkansas, was specifically challenged on federal grounds in the complaint of plaintiffs-appellants, the Supreme Court of Arkansas held said Act 207 of 1937 to be valid and to be consistent with the Constitution of the United States, and plaintiffs-appellants again challenged the validity of said Act 207 of 1937 on federal grounds in their motion to rehear, which the Supreme Court of Arkansas overruled and denied rehearing.

The Supreme Court of Arkansas failed and refused to take into consideration the prior laws, which have not been repealed, on the same express subject as Act 207 of 1937 along with Act 207 of 1937, Acts of Arkansas, in determining the law in the case at bar and by thus failing and refusing to consider said prior laws on the same express subject. The Supreme Court of Arkansas placed a construction and application of the law that is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. This failure of the Supreme Court of Arkansas to consider said prior laws came as a surprise and was wholly unanticipated by plaintiffs-apppellants and plaintiffs-appellants had no opportunity to anticipate and assert the federal question involved except in their petition for rehearing. This federal question was raised in the petition for rehearing for the first time and this was the only chance of raising this question as a federal question that the plaintiffs-appellants had. (Appendix B). When this question was raised

in the petition for rehearing the Supreme Court of Arkansas refused to consider same. These prior laws are expressly mentioned in the petition for rehearing (Appendix B) and are set out in full in Appendix D attached hereto. Same were argued as statutory construction before the Supreme Court of Arkansas. These said prior laws are still in full force and have not been repealed and are not in conflict with Act 207 of 1937, Acts of Arkansas, and if the Supreme Court of Arkansas would have considered said laws, then Act 207 of 1937 would have been construed and applied in a manner not inconsistent with the Constitution of the United States. By the Supreme Court of Arkansas considering said Act 207 of 1937 as standing alone without taking into consideration the other prior laws on the same express subject, plaintiffs-appellants rights are threatened under the Constitution of the United States because the construction placed upon said Act 207 of 1937 is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Plaintiffs-appellants had no opportunity to anticipate that the Supreme Court of Arkansas would fail and refuse to consider the other laws of Arkansas on the same express subject as that of Act 207 of 1937.

Plaintiffs-appellants raised another federal question for the first time in their petition for rehearing. The sale of the lands involved herein, by a commissioner appointed to make said sale, after same had been redeemed or partially redeemed constituted the taking of appellants lands in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States (Appendix B). Plaintiffs-appellants urged that they had the right to complete the redemption of their lands since a redemption certificate had been issued during the period of redemption which due to the carelessness or misprision of the clerk the

tax due for the year of 1934 had been left out. There has been a fixed rule under the decisions of the Supreme Court of Arkansas that under such circumstances a person could complete their redemption and a sale of the lands was error and void. However in the case at bar the decision of the Supreme Court of Arkansas, holding that the redemption certificate was not evidence that the owner of the lands had attempted to redeem same, came as a surprise and plaintiffs-appellants had no prior opportunity to assert this particular federal question.

The next federal question was raised for the first time in the petition for rehearing (Appendix B), the allegation and the question presented in same being that the holding of the Supreme Court of Arkansas that appellants were barred under the rule of stare decisis is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States, since appellants did not have their day in court. The Supreme Court of Arkansas held that the decision of *Pinkert* v. *Lamb,* 215 Ark. 879, was not res judicata and that appellants were not barred for that reason, but that the rule of law laid down in that case was controlling in the case at bar under the rule of stare decisis (Appendix A). In the case of *Pinkert* v. *Lamb,* 215 Ark. 879, the same lands were involved as in the case at bar, but, plaintiffs-appellants are the only persons having the legal title to same and plaintiffs-appellants were not parties to said suit and had no notice of same. Plaintiffs-appellants are non-residents of the State of Arkansas. Plaintiffs-appellants did not have their day in court in said case and the Supreme Court of Arkansas so held. The question of the rule of stare decisis had not been presented to the Supreme Court of Arkansas at any time, stare decisis was not pleaded at any time by defendants-appellees at any stage of the proceedings, and

the decision of the Supreme Court of Arkansas came as a surprise. The holdings that appellants were not barred by res judicata but were barred by stare decisis was an unexpected decision and gave plaintiffs-appellants no prior opportunity to assert this particular federal question, so appellants raised this question in their petition for rehearing for the first time. The decision in the case of *Pinkert* v. *Lamb*, 215 Ark. 879, was to the effect that Act 207 of 1937, Acts of Arkansas, was valid, however plaintiffs-appellants were not parties to that action even though the same lands were involved. If Act 207 of 1937, Acts of Arkansas, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States as is contended in the case at bar, then, so the decision in the case of *Pinkert* v. *Lamb*, 215 Ark. 897, is in error the same as the decision of the Supreme Court of Arkansas in the case at bar is in error. Stare decisis cannot apply to the case at bar under these facts and circumstances.

The jurisdiction of the Supreme Court to review this decision is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case: *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U. S. 182; *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 3 of Sevier County, Ark.*, 266 U. S. 379; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282; *New York, ex rel, Bryant* v. *Zimmerman*, 278 U. S. 63, 67; *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-8; *Craid* v. *Harney*, 331 U. S. 367, 373-4; *Sterling* v. *Constantin*, 287 U. S. 378, 398; *Creswill* v. *Grand Lodge*, 225 U. S. 246, 261; *Cedar Rapids Gas Light Co.* v. *City of Cedar Rapids*, 223 U. S. 655.

Questions Presented

James H. Stith was the actual owner and record owner and in possession of the lands involved in this action at the time Sewer Improvement District 94 filed suit to foreclose said lands for delinquent assessments due the District. Said foreclosure suit was filed in 1935 and in 1937, after Act 207 of 1937, Acts of Arkansas, was passed by the legislature, constructive service was had upon numerous land owners in the District by warning order under the provisions of said Act 207 of 1937, which provided for constructive service and provided that it was immaterial if the ownership of the lands was incorrectly alleged in such foreclosure proceedings. The law at the time said foreclosure suit was filed provided for personal service in such foreclosure proceedings. Other laws in full force and effect at that time in 1935 and which are still in full force and effect now since they have not been repealed are Act 85 of 1925, Acts of Arkansas, and Sections 5677, 5678, 5679 & 5700, Crawford & Moses Digest of the Statutes of Arkansas. These laws provide that the last owner of record be made a party defendant to such foreclosure proceedings and Act 85 of 1925, Acts of Arkansas, also provides that the owner of lands in municipal improvement districts as same is shown from the tax records of the district itself be made a party defendant to such proceedings. James H. Stith was the actual owner of the lands involved in this action, he was the last owner of record and he was the owner shown in the tax records of Sewer Improvement District 94. *James H. Smith* was named in the complaint, warning order and decree. *James H. Stith* was not named at any time in the proceedings and had no notice of the pendency of said proceedings. The Supreme Court of Arkansas held that Act 207 of 1937, Acts of Arkansas,

applied to the case at bar and that under said Act 207 of 1937 it was immaterial that *Stith* the owner of the lands involved herein was not made a party to the proceedings and that notice to *Smith* was binding upon *Stith* and that the notice of the sale of said lands did not name anyone as the owner of said lands and did sufficiently describe the lands to be sold, but, that the defects were cured by the confirmation of said sale. Upon this set of facts the following questions, which are closely interwoven and related, are presented:

1. That Act 207 of 1937, Acts of Arkansas, violates the due process clause of the 5th and 14th Amendments to the Constitution of the United States in that said Act 207 does away with the necessity of notice to landowners and makes it immaterial that the owner of lands be made a party to foreclosure proceedings in municipal improvement districts and permits the taking of lands without notice and without due process of law.

2. The application of Act 207 of 1937, Acts of Arkansas, to the case at bar violates the due process clause of the 5th and 14th Amendments to the Constitution of the United States because the foreclosure proceedings attacked in the case at bar was pending at the time said Act was enacted and said Act changed the basic nature of the proceedings from one not in rem to one in rem.

3. The lands of James H. Stith were taken in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States because *Stith* was not made a party to the foreclosure proceedings wherein his lands were foreclosed and sold, *Stith* did not have his day in court, *Stith* did not have any notice of said proceedings even though the Commissioners of Sewer Improvement District 94 knew from their own records his correct name

and correct address, notice to *Smith* is not notice to *Stith*, and notice to *Smith* is not binding upon *Stith*.

4. The notice of the sale of the lands in the case at bar did not name anyone as the owner and did not sufficiently describe the lands to be sold and constituted no notice whatsoever and said want of notice constituted the taking of appellants lands without notice in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

5. The application of Act 207 of 1937, Acts of Arkansas, to the case at bar without taking into consideration the prior laws, on the same express subject which have not been repealed, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The Supreme Court of Arkansas erred in failing and refusing to consider these prior laws in construing said Act 207 of 1937. The prior laws the Supreme Court of Arkansas failed to consider are: Act 85 of 1925, Acts of Arkansas, and Sections 5677, 5678, 5679 and 5700, Crawford & Moses Digest of the Statutes of Arkansas.

6. The holding of the Supreme Court of Arkansas that there was no evidence in the record to show that James H. Stith had attempted in good faith to redeem his lands during the period of redemption, is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. The record affirmatively shows that a redemption certificate was issued during the period of redemption and that for some reason due to the carelessness of the clerk the tax for the year 1934 was omitted and that all prior and subsequent taxes were paid. The evidence contradicts the findings and holdings of the Supreme Court of Arkansas.

7. The holding that appellants are barred under the rule of stare decisis by the decision in the case of *Pinkert* v.

Lamb, 215 Ark. 879, is in error and in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Appellants were not parties to the action in the case of *Pinkert* v. *Lamb,* 215 Ark. 879 even though their lands were involved in that action, appellants did not have their day in court in said cause.

All other points of law and questions set forth in the Assignment of Errors are also presented.

Statutes Involved

Act 207, Acts of Arkansas 1937; Act 85, Acts of Arkansas 1925; Sections 5677, 5678, 5679 and 5700, Crawford & Moses Digest of the Statutes of Arkansas; and Amendment 5 and Amendment 14, Section 1, Constitution of the United States, are set forth in Appendix D attached hereto.

Statement

James H. Stith, father of plaintiffs-appellants herein, purchased the lands involved herein, the west half of Lots 1, 2, 3, 4, 5, and 6, Block 8, Adams Addition to the City of Little Rock, Arkansas, in 1902, built his home on said lots, and raised his family there, and lived on said property until his death in 1942. He left surviving him three children, Herbert Stith, James H. Stith, Jr., and Melanie Stith Tabor, plaintiffs-appellants herein, and a widow, Ella Stith who is the mother of one of the appellants herein and stepmother of the other two appellants herein. Ella Stith, widow of James H. Stith, deceased, remained in possession of the homeplace, hereinabove described, until she was dispossessed by and through the mandate of the Supreme Court of Arkansas in the case of *Pinkert* v. *Lamb,* 215 Ark. 879, opinion rendered October 17, 1949. Plaintiffs-appellants moved away from the State of Arkansas over 20 years ago and are and have been non-residents of the State of Ar-

kansas since that time. Plaintiffs-appellants were not parties to the ejectment suit which dispossessed Ella Stith, *Pinkert* v. *Lamb,* 215 Ark. 879, and had no notice, either actual or constructive, of the pendency of said action.

Defendants-appellees, Ed Pinkert and Manie Schuman, acquired title to the lands involved herein from W. I. Stout, Trustee, who acquired title to same by virtue of a deed from H. S. Nixon, Commissioner, appointed by the Chancery Court to sell same for Sewer Improvement District 94 as the result of a foreclosure decree in 1937 wherein said lands were sold to the District in 1938 for the tax due for the year 1934 in the sum of $2.18 tax and $0.44 penalty. The Home Owners Loan Corporation, mortgagees of James H. Stith, redeemed the lands involved herein in 1934 from Sewer Improvement District 94 for all prior taxes due the District and again redeemed said lands in 1939 for all prior taxes due said District, but for some reason apparently due to the mistake, carelessness or misprision of the clerk the 1934 tax was not included in the redemption certificate. The foreclosure decree foreclosing the lands involved herein for the 1934 tax due Sewer Improvement District 94 was rendered in 1937 on a complaint filed in 1935, in case No. 37177, Chancery Court of Pulaski County, Arkansas.

Plaintiffs-appellants filed this suit against Ed Pinkert and Manie Schuman, defendants-appellees herein, and against Robert W. Griffith, Jr., W. I. Stout, Trustee, Ella Stith, L. E. Ellenbogen, and Louis C. Cohen, doing business as The Elco Agency, rental agents of Ella Stith, and Board of Improvement of Sewer Improvement District No. 94 of the City of Little Rock, Arkansas. Plaintiffs-appellants alleged and proved among other things that the complaint, warning order and decree in the case No. 37177, Pulaski Chancery Court, wherein the lands involved herein were sold to Sewer Improvement District 94, did not name *James*

H. Stith as a party defendant at any time, but instead *James H. Smith* was named as defendant in said proceedings; that *James H. Stith* was the last owner of record and that the tax records of Sewer Improvement District 94 showed the owner of the lands involved herein as being *James H. Stith* and also showing his correct address as being 2223 West 19th St., Little Rock, Arkansas; that *James H. Stith* was known in the community as owning and living upon the lands involved herein at aforesaid address; and that the notice of the sale of the lands involved herein did not name anyone as the owner of the lands to be sold and that the description of said lands, among other lands, was given in said notice of sale as follows: "The following described real estate to-wit: Lots 21, 22, Block 1, Lots 1 to 6, inclusive, 12, 13, 16, 17, Block 4, West 33 feet of East 66 feet of 1, 2, 3, 4, 5, 6. West one-half of 1, 2, 3, 4, 5, 6; 7 to 11 inclusive, Block 8, all in Adams Addition" (R. 68) (also see Appendix A). In addition to alleging and proving the above facts, plaintiffs-appellants attacked said proceedings as being in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States for the reason that *James H. Stith* was not a party to said proceedings, did not have his day in court, had no notice of said proceedings, *Notice to Smith* is not *Notice to Stith*, and that the notice of the sale did not name any person as the owner of said lands and the description of the lands in said notice was insufficient and jumbled in such a way that one could not tell from the notice what lands were to be sold and constituted no notice whatsoever. The Chancery Court held the sale to be valid (Appendix C). Plaintiffs-appellants appealed to the Supreme Court of Arkansas where this cause was tried de novo. The Supreme Court of Arkansas affirmed the decision of the Chancery Court. Plaintiffs-appellants specifically attacked the validity of Act 207,

Acts of Arkansas 1937, as being unconstitutional in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States and attacked the application of said Act 207 to the case at bar for the same reasons on the same federal grounds at every step of the proceedings. Defendants-appellees pleaded res judicata, estoppel, and collateral attack. The Supreme Court of Arkansas held that res judicata was not in the case, that Act 207, Acts of Arkansas 1937, was valid and held that said Act did not offend the Constitution of the United States, that under said Act that it was immaterial that James H. Stith was not made a party to the foreclosure proceedings, that the defects in the notice of the sale of the lands involved herein were cured by the confirmation of said sale, that under said Act 207 of 1937, notice to *Smith* was binding upon *Stith,* that appellants were barred by stare decisis under the decision of *Pinkert* v. *Lamb,* 215 Ark. 879, and that there was no evidence that James H. Stith had attempted to redeem his lands, the redemption certificate was not evidence of that fact. The Supreme Court of Arkansas was in grave error. (Appendix A.) In addition to the lands there is over $1000.00 in accrued rents involved in this action (R. 3). Also see R. 77.

The Questions Are Substantial

The issues in this appeal are of vital importance to all the property owners in all municipal improvement districts in the entire State of Arkansas. Act 207, Acts of Arkansas, 1937, Section 2, providing that it shall be immaterial that the ownership of the lands to be foreclosed upon be incorrectly alleged in the proceedings and providing for constructive service upon residents as well as non-residents and the application of said Act by the Supreme Court of Arkansas and the holding by said Court that confirmation of the sale

of lands in such proceedings cures all defects in the notice of the sale, certainly threatens the fundamental rights of the land owners in municipal improvement districts in the entire State of Arkansas. Every citizen of the United States is entitled to notice that his lands are to be sold, and is entitled to his day in court before his lands are taken from him and any statute and any rule or decision of any court to the contrary violates the due process clause of the 5th and 14th Amendments to the Constitution of the United States. There are several other suits pending in the lower courts in Arkansas involving these same questions. The issues in this appeal are of importance to the administration of justice in the courts of Arkansas in municipal improvement district foreclosure proceedings. Plaintiffs-appellants are colored people without much education and need the protection of the courts. The issues in this appeal are of sufficient public interest to justify the Supreme Court of the United States in taking jurisdiction on appeal and to merit the full consideration of the Supreme Court.

1. Act 207, Acts of Arkansas 1937, page 758, plainly shows the intention of the legislature in its preamble which in short states that it is an Act to amend and supplement the law governing the foreclosure of liens for assessments due in municipal improvement districts. (Appendix D.) Section 8 of said Act 207 is as follows:

> "Section 8. This act is intended to supplement the laws now in force relative to foreclosure of assessment liens in municipal improvement districts, and the service by notice as herein provided shall be just as effective and binding on the property as though service was had under Section 5677 and 5679 of Crawford and Moses Digest of the Statutes of Arkansas."

Section 9 of said Act 207 is as follows:

> "Section 9. This act is declared to be severable and if any part hereof should be invalid it shall not affect the remainder of this act. This Act is to be cumulative and shall repeal only those Acts in direct conflict herewith."

Thus taking the provisions of the Act itself it is easily shown that the legislature intended that the Act be in addition to the laws in existence at the time of its enactment. Cumulative and supplemental means something in addition thereto. Thus it is contended by plaintiffs-appellants that said Act 207 is not retroactive as so held the Supreme Court of Arkansas in the case at bar, but on the contrary, said Act 207 applies to suits filed after its enactment and should be read in conjunction with and together with the laws in existence at the time of its enactment and does not apply to suits pending at the time of its enactment.

The Supreme Court of Arkansas read Act 207, Acts of Arkansas, 1937, as standing alone, and the pertinent part the Court relied upon in thus construing the law in the case at bar is as follows:

> "Section 2. * * *. Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall be immaterial that the ownership of the said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant. * * * "

The portions of Section 2, Act 207 of 1937, omitted are not relevant to the issues in this appeal. The omitted parts of this section provide in brief that the suit to enforce the collection of past due assessments be brought in the Chancery Court of the County in which the improvement district is

situated and that if a building occupies more than one lot or tract of land, the property may be listed together on one line.

Section 3, Act 207, Acts of Arkansas 1937, provides that notice of the pendency of the suit shall be by warning order to be published weekly for four weeks and sets out the form of the warning order to be used, and provides that the name of each *supposed owner* be set opposite his or her land (Appendix D).

Section 4, Act 207, Acts of Arkansas 1937, in brief provides that judgment shall be given after notice of the pendency of the action had been published as provided in Section 3, that after judgment a commissioner be appointed and directed to sell the lands after having first advertised such sale in some newspaper published in the County weekly for two consecutive weeks and that the publication may include all the lands described in the decree (Appendix D). This section does not make any provision as to naming the owner of the lands in the notice of the sale to be had, nor does it set out the form of notice to be used, it just provides for a two weeks notice of the sale and that it shall describe the lands in the decree to be sold.

The issues involved in this appeal as to the above parts of Act 207, Acts of Arkansas 1937, are clearly defined. The Supreme Court of Arkansas held in the case at bar that it was immaterial whether or not *Stith,* the owner of the lands involved herein, was named in the complaint, warning order and decree; that the naming of *Smith* in the complaint, warning order and decree was binding on *Stith* and that notice to *Smith* was notice to *Stith* for the reason that said Act 207, Acts of Arkansas 1937, applied to the case at bar and that under said Act 207 it was immaterial that the ownership of the land be incorrectly alleged; and that even assuming that the description of the

lands in the notice of the sale was insufficient that such defect was cured by the confirmation of the sale; and that Act 207 of 1937 did provide that the owner of the lands to be sold should be named. The Supreme Court of Arkansas was gravely in error. By thus construing said Act 207 of 1937 as standing alone without reading it in conjunction with the laws in existence on the same express subject, the Court placed a construction on said Act 207 that is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. (For the opinion of the Supreme Court of Arkansas see Appendix A). The effect of the decision in the case at bar is to make it unnecessary under Act 207, Acts ofArkansas 1937, to make any owner of any land in any municipal improvement district foreclosure proceedings a party to the proceedings, unnecessary to name the owner in the warning order correctly or incorrectly, and unnecessary to name the owner in the notice of the sale, and unnecessary to properly describe the lands to be sold in the notice of the sale. In plain words the Court in effect held that it was unnecessary to give any notice to the owner of lands that his lands were to be taken and sold for assessments past due in municipal improvement district foreclosure proceedings. The Supreme Court of Arkansas is in grave error. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party and no sale of a persons land arising out of such judgment is valid and neither is such sale valid when such sale was had upon a notice that constituted no notice at all. **The Chancery Court**, in the proceedings wherein appellants lands were foreclosed and sold, had no jurisdiction to render such judgment because *Stith*, the owner of said lands, was not a party to the proceedings, had no notice of the proceedings, and the notice of the sale

of same based upon said judgment did not name anyone and did not sufficiently describe the lands to be sold, thus *Stith's* lands were taken without notice and said proceedings were not due process of law. The Supreme Court of Arkansas is gravely in error in upholding such proceedings and in construing Act 207, Acts of Arkansas 1937, as making such proceedings valid.

While the facts are different, the principles of law laid down in the case of *Moses H. Scott* v. *John H. McNeal*, et al, 154 U. S. 34, 45, 46, 47 (38 L. Ed. 896, 901, 902) apply to the case at bar in this appeal and *Mr. Justice* Gray, speaking for the Supreme Court:

> "The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive or its judicial authorities. *Ex parte Virginia* (*"Virginia* v. *Rives"*) 100 U. S. 313, 318, 319 (25: 667, 669); *Ex parte Virginia*, 100 U. S. 339, 346 (25: 676, 679); *Neal* v. *Delaware*, 103 U. S. 370, 397 (26: 567, 574). And the first one, as said by *Chief Justice* Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554 (23: 588, 592), repeating the words of *Mr. Justice* Johnson in *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, 244 (4: 559, 561); was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice'."
>
> Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the terri-

tory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attril*, 146 U. S. 657, 683, 684 (36: 1123, 1133); *Mobile & O. R. Co.* v. *Tennessee, ante*, p. 793.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party.

The words "due process of law," when applied to judicial proceedings, as was said by *Mr. Justice* Field, speaking for this court, "mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance." *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (24: 565, 572).

Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves party to the proceedings, and who had notice, either actually, or by the thing condemned being first seized into the custody of the court. *The Mary*, 13 U. S. 9 Cranch, 126, 144 (3: 678, 684); *Hollinsworth* v. *Barbour*, 29 U. S. 4 Pet. 466, 475 (7: 922, 926); *Pennoyer* v. *Neff*, 95 U. S. 714, 727 (24: 565, 570). And such a judgment is wholly void, if a fact essential to the jurisdiction of the court did not exist. The jurisdiction of a for-

eign court of admiralty, for instance, in some cases, as observed by *Chief Justice* Marshall, "unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property." *Rose* v. *Himely,* 8 U. S. 4 Cranch, 241, 269 (2: 608, 617). Upon the same principle, a decree condemning a vessel for unlawfully taking clams, in violation of a statute which authorized proceedings for her forfeiture in the county in which the seizure was made, was held by this court to be void, and not to protect the officer making the seizure from a suit by the owner of the vessel, in which it was proved that the seizure was not made in the same county, although the decree of condemnation recited that it was. *Thompson* v. *Whitman,* 85 U. S. 18 Wall. 457 (21: 897)."

One not a party to an action, nor notified of its pendency, is not bound thereby. *Hale* v. *Finch,* 104 U. S. 261 (26 L. Ed. 732).

Even in proceedings *in rem* one is not bound by a judgment unless he was a party or privy to the proceedings or unless he had notice of the proceedings and the facts and the questions of law are not res judicata. *Gratiot County State Bank* v. *Johnson,* 249 U. S. 246 (63 L. Ed. 587).

It is not necessary to burden the Court with numerous citations on this question. The above cited decisions contain the principles applicable to the case at bar even though the facts are different. Needless to say, when *Smith* was named in the complaint, warning order and decree, *Stith* was not a party to the proceedings and *Stith* did not have notice of the pendency of the action wherein his property was foreclosed and sold. The notice of the sale named no one as the owner and did not describe the lands to be

sold in a way as to constitute notice. It is fundamental that notice to one person is not notice to another and it is equally fundamental that there cannot be any presumptions indulged in as to a question of constructive notice. There can not be any presumptions that the name of one person in a warning order is intended to be the name of another. Notice to *Smith* is not notice to *Stith* and *Stith* is not bound thereby. This precise question has been passed upon and settled by the Supreme Court of the United States in the case of *Marx* v. *Hanthorn*, 148 U. S. 172, 183, 184 (37 L. Ed. 410, 414) where the statutes of Oregon concerning sales of property for taxes required that a notice of the sale be published in the newspaper, but did not require that the name of the owner be given in the notice. In that case there was a publication as notice of the sale and the notice listed the name of *Ida J. Hawthorn* as the owner of the lands to be sold. The lands actually belonged to *Ida J. Hanthorn* and the court held that the notice must give the name of the owner and the notice to *Hawthorn* was not notice to *Hanthorn* and the decision of the state court was affirmed. This was the decision of the Supreme Court of the United States even though the statute did not require the naming of the owner of the lands to be sold. A fortiori, in the case at bar notice to *Smith* is not notice to *Stith* even though the statute, Act 207, Acts of Arkansas 1937, did not require that the notice of the sale name the owner of the lands to be sold. Naming *Smith* in the complaint, warning order and decree, was not notice of the pendency of the action to *Stith*. *Mr. Justice* Shiras speaking for the court in the case of *Marx* v. *Hanthorn*, 148 U. S. 172, 183, 184 (37 L. Ed. 410, 414) said:

> "This brings us to a consideration of the matters put in evidence by the defendant, going to overthrow the prima facie presumptions created by the tax deed.

There were two. The land in question was admitted to belong to Ida J. Hanthorn, and that fact was found by the court below; but on the delinquent tax roll the property is alleged to belong to Ida J. Hawthorn, and it further appears by the return of the Sheriff that the property was advertised and sold as the property of Ida J. Hawthorn.

It was the opinion of the court below that due and reasonable notice of the sale of property for a delinquent tax is necessary for the validity of such sale, and that the fair meaning of the Oregon statutes relating judicial sales and sales for taxes is that the name of the owner of the lands to be sold shall appear in the notice of the sale; and the court was further of the opinion that to give notice that the property of Ida J. Hawthorn was to be sold was not only not notice that the property of Ida J. Hanthorn was to be sold, but was actually misleading, and that such want of notice or misleading notice vitiated the sale.

It is contended, on behalf of the plaintiff, that the statute does not require that the notice should name the owner or name him correctly; that it is sufficient to correctly describe the property which is to be sold; and that at any rate, the notice in the present case was sufficient within the meaning of the rule of *idem sonans.*

We agree with the court below in thinking that the reasonable meaning of the statutes regulating notices and sales of property for taxes, is that such notice and advertisement should give the correct names of those whose property is to be sold. While the statutes do not in terms say that the names of the owners should be published, yet such would seem to be the fair presumption, and the present case shows that such was the construction adopted by the officials, as they did name, though incorrectly, an owner in the notice."

And in conclusion the Supreme Court of the United States, in the case of *Marx* v. *Hanthorn,* 148 U.S. 172, 185 (37 L. Ed. 410, 414), supra, on this express question, said:

"As, however, we think that the court below did not err in permitting the defendant to impugn the tax title by showing that the name of the owner was wrongly given in the delinquent tax roll, and in the notice and publication, and in holding the sale was thereby invalidated, it follows that its judgment should be affirmed."

In the case at bar, we think that the rules set out above apply to the questions in this appeal. Here the Supreme Court of Arkansas held that under the provisions of Act 207, Acts of Arkansas 1937, that it was immaterial if the name of the owner was incorrectly stated in the proceedings and that the notice of the sale did not have to name anyone as the owner, because the Statute did not require it to be done, and that an incorrect description in said notice did not render the sale invalid, because confirmation of same cured those defects (Appendix A). The Supreme Court of Arkansas is clearly in error. A person must have some notice that his land is to be sold and if not given proper notice then the sale is had without due process of law and is void and nothing can cure such a sale. It makes no difference if the sale is one for taxes by virtue of a judicial sale or if the sale is by an administrative officer, it still is a tax sale and before a persons property can be validly sold for taxes he must be given notice of the proceedings and of the sale so that he can protect his rights in his property. We submit that the decision in the case at bar should be reversed and remanded with directions to cancel the tax deed of defendants-appellees.

As to another decision on this particular question see the case of *Virginia and West Virginia Coal Co.* v. *Charles*, 251 Fed. 83, where the court held that notice to *Robert Smith* that his land was to be sold for taxes was not notice to *Richard Smythe* and that the sale of same was void.

2. In construing Act 207, Acts of Arkansas 1937, the Supreme Court of Arkansas construed said Act as standing alone and thus placed a construction upon the Act that renders said Act invalid as being in violation of the due process clause of the 14th Amendment to the Constitution of the United States. The prior laws which the court overlooked are set out below:

CRAWFORD AND MOSES DIGEST OF THE STATUTES OF ARKANSAS

"Section 5677. Name of last Owner. In suits to foreclose the liens of assessments upon property in such improvement districts the name of the last owner of the property as it appears in the recorder's office shall always be given as the owner, and such party shall be made defendant, unless the commissioners know that some other party has acquired title; in which event such actual owner shall be made the defendant. Act March 3, 1913, p. 527, # 4.

Section 5678. Default decree. Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and cost and an attorney's fee. Act March 22, 1881, p. 161, # 10.

Section 5679. Constructive service. If the sheriff, or other officer, to whom the writ may be directed, shall return that the defendant is not to be found in his county, or if the owner is stated in the complaint to be unknown, service shall be made by affixing a copy of the summons to the property assessed, or to some part thereof, for fifteen days, and by publishing a copy of the summons in some daily or weekly paper, published in the city, for one insertion, and the cause shall be made ready for hearing within fifteen days after such publication, and a decree shall be rendered as in actual service. Id. # 10.

Section 5700. Terms of sale. All sales shall be for cash, and to the highest legal bidder. If sales are not completed on the first day, the commissioner shall continue the same day to day until completed. In other respects such sales shall be governed by the rules and laws regulating other sales of land made under decrees in chancery, and with like notice. Id. # 25." See Appendix D.

Act 85, Acts of Arkansas 1925, Section 1, the portions applicable provides in brief that the collector shall make a delinquent list and the list shall include the name of the owner as the same appears on the tax books. Section 6, provides that when the board of commissioners file suit for the collection of delinquent taxes that a certified copy of the delinquent list shall be filed with the complaint. (Appendix D)

The preamble of Act 207, Acts of Arkansas 1937, expressly states that the act is to amend and supplement the laws now in force. Section 8 provides that the act is to be supplemental to the laws now in existence and that service under this act shall be just as effective and binding as though had under Sections 5677 and 5679 Crawford and Moses Digest of the statutes of Arkansas. Section 9 provides that the act shall be cumulative and shall repeal only those acts in direct conflict herewith. Section 3 provides for service by warning order and that the supposed owner shall be named therein. Section 2 provides that it shall be immaterial if the ownership of the lands be given incorrectly alleged in the proceedings. (Appendix D). The compiler of the — evidently meant section 5678 instead of 5677 Crawford & Moses Digest of the Statutes of Arkansas because section 5677 does not deal with service of process at all while the former section does. Be that as it may, When an Act of the legislature by it own express provisions is supplemental and cumulative, it certainly is

not retroactive and does not apply to suits pending at the time of its enactment. A statute is never retroactive unless expressly made so by its own provisions. Act 207 of 1937 by its own terms is not applicable to the foreclosure suit attacked in the case at bar, said foreclosure suit being filed in 1935 two years before said Act 207 was passed and service attempted after said Act was passed.

The basic law was changed as to foreclosure of lands for taxes in municipal improvement districts. At the time the foreclosure suit was filed the law required the last owner of record to be made a party defendant and provided for personal service of process and Act 207 of 1937 provides for service by warning order and that it is immaterial that the owner be named correctly or incorrectly in the proceedings. The proceedings before the enactment of said Act 207, were proceedings quasi in personam and quasi in rem, quasi in personam in that the suit was against a certain defendant, the owner of the land as shown by the records, and quasi in rem in that only the lands involved should be held for the tax and no other land of the defendant. After enactment of Act 207 of 1937 the nature of the proceedings were changed to one strictly in rem. Thus the application of said Act 207 of 1937, Acts of Arkansas, to the case at bar is an error and the Supreme Court of Arkansas by applying said Act 207 to the case at bar took appellants lands in violation of due process of law in violation of the 5th and 14th Amendments to the constitution of the United States. By necessary intendment of the legislature determined from reading and studying the prior laws is that the legislature still intended that the owner of the lands be made a party to the proceedings and be given notice of same; the officials thought so or else no one would have been named in the warning order. Thus it is seen that the Supreme Court of Arkansas erred in

applying Act 207, Acts of Arkansas 1937 to the case at bar.

3. As to the other questions presented, as stated in the assignment of errors, and set out therein, they are expressly reserved even though not discussed at length. In passing we say that when the Supreme Court of Arkansas has held in two recent cases, *Word, Receiver* v. *Grigsby*, 206 Ark 164 and *Schuman* v. *Person*, 216 Ark 732, that one could complete a redemption of his land in improvement districts where he had made a partial redemption or had attempted in good faith to redeem his lands and was prevented from doing so by the error of the clerk; and then held in the case at bar that the redemption certificates were not evidence that a redemption had been attempted in good faith; and that in the face of the redemption certificates showing that all the prior and subsequent taxes had been paid except for the year 1934; certainly said decision came as a surprise and constitutes the taking of appellants lands in violation of his constitutional rights. One is not presumed to do a vain thing. Why would a man redeem for all prior and subsequent taxes, subsequent to the sale and yet knowingly leave out the tax for one year? No person would do that knowingly.

As to stare decisis, the Supreme Court of Arkansas held that plaintiffs-appellants are barred by stare decisis under the decision of *Pinkert* v. *Lamb*, 215 Ark 879. The case just mentioned involved the same lands as is involved in this appeal, yet plaintiffs-appellants were not parties to that suit and the court held that they were not barred by res judicata. In *Pinkert* v. *Lamb*, supra, the court merely held Act 207 of 1937 Acts of Arkansas to be valid, so if the Act is valid and plaintiffs-appellants should lose this appeal then that decision is correct; but on the other hand

if the Act 207 of 1937 is invalid as claimed by appellants then both decisions are wrong and must fall, and the decision in that case as well as in the case at bar are both in error. Stare decisis has no place in this appeal. We submit that the court erred in such holding.

The Supreme Court of Arkansas relied upon the case of *Ballard* v. *Hunter,* 74 Ark 174, affirmed *Ballard* v. *Hunter,* 204 U. S. 241, 51 L. Ed. 461. In that case Ballard was a resident of Georgia and the Statute provided for personal service against residents of Arkansas and constructive service against non-residents of the State of Arkansas and was the Act creating the St. Francis Levee District by a special Act of the legislature. The Supreme Court of the United States held (see page 262 in the opinion, page 474 L.Ed.) that the proceedings were appropriate to the nature of the case. The facts are different in this case than those of the case at bar. There the owners were non-residents of the State of Arkansas; in the case at bar the owner was a resident of Arkansas and his correct address and correct name was known to the commissioners of the district. So the facts do not fit at all because had the owner in the Ballard case been a resident then personal service would have been required even under the special statute in consideration there. In the case at bar the statutes involved are the general laws of the State. We submit that the case of *Ballard* v. *Hunter,* supra has no application to the case at bar, and did not cover the precise questions that are involved in this appeal. While *Ballard* v. *Hunter,* 204 U. S. 241 and *Marx* v. *Hanthorn,* 148 U. S. 172, have both been cited with approval many times, the two cases do not conflict at all since the precise questions in both cases are different. *Marx* v. *Hanthorn,* supra, clearly applies to the case at bar and *Ballard* v. *Hunter,* does not apply at all. The cases are clearly distinguishable.

While the facts are different, the rule laid down as to notice in proceedings in rem in the case of *Griffin* v. *Griffin*, 327 U. S. 220, 90 L.Ed. 635, is correct and should be followed. There the Supreme Court held that notice by personal or constructive service cannot be dispensed with even in proceedings in rem with respect to property within the jurisdiction of the court.

It is submitted that the decision of the Supreme Court of Arkansas is in error in holding Act 207, Acts of Arkansas, 1937, to be valid, in error in holding that said statute applied to the case at bar, in error in its construction of the statute aforesaid, and in error in holding that notice to *Smith* is binding upon *Stith*. The decision of the Supreme Court of Arkansas should be reversed and remanded. If this decision is upheld then numerous land owners over the State of Arkansas face the risk of losing their lands without notice. We believe that the questions are, as presented in this appeal, substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. 9297

Opinion Delivered 11/13/50

HERBERT STITH, ET AL,

v.

ED PINKERT, ET AL.

PULASKI CHANCERY COURT DECREE AFFIRMING

EDWIN E. DUNAWAY, Associate Justice

For the second time the question of appellee Pinkert's title to the West ½ of Lots 1 to 6 inclusive, Block 8, Adams Addition to the City of Little Rock, Arkansas is before this court. The first case was *Pinkert* v. *Lamb*, 215 Ark. 879, 224 S. W. 2nd, 15.

In the *Lamb* case, the litigation was between Ed Pinkert and Ella Stith, widow of James H. Stith. Pinkert claimed Title through mesne conveyances from Sewer Improvement District No. 94 of Little Rock. The District had purchased the property at a commissioner's sale held pursuant to a decree of the Pulaski Chancery Court rendered November 23, 1937, condemning said lots to be sold for delinquent assessments for the year 1934. Ella Stith claimed in a collateral attack on the foreclosure decree and sale thereunder that they were void for various reasons.

We upheld the validity of the foreclosure sale of the property to the district in the former case and reversed the Chancellor's decree to the contrary. One day before the mandate was issued by this court in that case, the instant suit was begun by appellants herein, Herbert Stith, James H. Stith, Jr., and Melanie Stith Tabor, the surviving children and heirs of James H. Stith, deceased, who died in 1942. All three appellants are non-residents of the State of Arkansas and have been for many years.

The first action, later transferred to equity, had been begun as one in ejectment by Pinkert against John Lamb, alleged to be in possession of the property as tenant of James H. Stith. At the first trial it was stipulated that Ella Stith was the record title owner prior to the sale of the lots to the District and that she held possession through Lamb as tenant.

It now develops that Ella Stith had only a dower interest in the property and that appellants herein, owners of the fee as heirs-as-law of James H. Stith, had not been made parties to the first action. The stipulation had evidently been made by counsel under a misapprehension of the facts, in an effort to expedite trial of the cause when it was shown that James H. Stith was deceased.

In the instant case, the Stith heirs sought cancellation of Pinkert's deed and an accounting of the rents and profits from the property. They joined as defendants Pinkert and one Schuman, alleged to be tax-title speculators; the receiver of District No. 94 and the Board of Commissioners of said District; certain parties who had collected rents from the property; and Ella Stith, mother of one appellant and step-mother of the other two. Only Pinkert and Schuman answered or appeared.

The complaint alleged all the same grounds of invalidity of the foreclosure and sale as were presented in *Pinkert* v. *Lamb, supra,* together with certain new matters. It was alleged that the foreclosure decree was void because James H. *Smith,* rather than James H. *Stith,* had been named as owner in the complaint filed against the property by the District; and because this same mistake was made in naming *Stith* as the owner in the warning order or published notice of pendency of the suit. In addition to these two defects, which were alleged and proved in the *Lamb* case, it was alleged and proved that in the notice of the sale the property was described, but the name of the owner was omitted entirely. It was further alleged that the description in said notice of sale was so indefinite as to void the sale.

At the outset appellees contend that the judgment in *Pinkert* v. *Lamb, supra,* is *res judicata* of the present suit.

Appellants, on the other hand, contend that since they were not parties nor privy to the prior suit, the doctrine of *res judicata* is inapplicable and they are not bound by the former judgment. We agree that *res judicata* is not in the case, but the law as declared in the opinion in the *Lamb* CASE is controlling in the case at bar under the rule of *stare decisis.*

In the *Lamb* case we held that Act 207 of 1937 (Ark. Stats. 1947 20-441 et seq.) governed the procedure to be followed in the foreclosure suit brought by the District. Then it was urged and now appellants argue that Act 207 is violative of the due process clause of the U. S. Constitution, in making the foreclosure proceedings an action in rem against the lands, in providing for constructive service, and in providing that an incorrect allegation of ownership should be immaterial. In sustaining the constitutionality of the statute we fully discussed these questions in the *Lamb* case. We adhere to the views there expressed.

Appellants further argue that we erred in holding Act 207 applicable since the foreclosure suit was already pending at the time said act became effective March 8, 1937. Appellants argue that the statute should be construed to be applicable only to suits commenced after its enactment. The statute pertained only to the mode of procedure and did not create any new rights or take away any vested rights. "Practice and procedure include the mode of proceeding and the formal steps by which a legal right is enforced. Those words comprehend writs, summonses, and other methods of notice to parties as well as pleadings, rules of evidence and costs. Practice and procedure indicate the forms for enforcing rights as distinguished from the law which creates, defines and protects rights." *Duggan* v. *Ogden,* 278 Mass. 432, 180 N. E. 301, 82 A.L.R. 765. As stated by this court in *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653 (at p. 1039): "The rule established by this court is that statutes in regard to remedies in procedure may be construed to apply to all pending proceedings, and will be so applied unless the language of the statute indicates a contrary intention." There is no such language in Act 207.

We adhere to our decision in the *Lamb* case in holding Act 207 of 1937 applicable to this foreclosure proceedings.[1]

As discussed fully in the *Lamb* case, the misspelling of *Stith* as *Smith* in the complaint and warning order did not render void the foreclosure decree of the Chancery Court of November 23, 1937. Section 2 of Act 207 (Ark. Stats. 1947. 20-441) which prescribed the procedure for enforcing collection of delinquent assessments by sale of the delinquent lands contains this provision: "Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall be immaterial that the ownership of the said lands . . . be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant." Validity of a similar statutory provision was sustained by this court in *Ballard* v. *Hunter,* 74 Ark. 174, 85 S.W. 252, affirmed by the Supreme Court of the United States in *Ballard* v. *Hunter,* 204 U. S. 241, 27 S. Ct. 261, 51 L. Ed. 461.

To hold that the obvious clerical error in misstating the name Stith rendered the decree void, would render the quoted statute meaningless. There is no contention made nor anything in the record in the instant case to indicate that there was such a person as James H. Smith, or that Stith and his heirs were in any way mislead by this mistake in the complaint and warning order.

We turn now to a consideration of appellants' contention that failure to name the owner in the published notice of sale rendered the sale void. As already pointed out, the challenged proceeding was one in rem against the property. Section 4 of Act 207 (Ark. Stats. 1947, Sec. 20-444) providing for publication of notice of sale contained no requirement that the owner or supposed owner be named. Certainly, if an erroneous allegation of ownership is immaterial in the complaint and warning order omission of the owner's name in the notice of sale would not be a fatal defect.

As to notice of sale, appellants also argue that the following description used therein was indefinite and confusing:

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[1] As pointed out in the *Lamb* case, Act 207 of 1937 was subsequently amended by Act 130 of 1939 and Act 195 of 1949, which are inapplicable to the case at bar.

"The following described real estate to-wit: Lots 21, 22, Block 1, lots 1 to 6, inclusive, 12, 13, 16, 17, Block 4, West 33 feet of East 66 feet of 1, 2, 3, 4, 5, 6, West one-half of 1, 2, 3, 4, 5, 6; 7 to 11 inclusive, Block 8, all in Adams Addition".

It should be noted that challenged description appeared in the notice of sale and not in the complaint, warning order, or decree of foreclosure. The description used in the earlier steps of the proceeding was as follows: West ½ of lots 1-6, incl., Block 8, Adams Addition". Sufficiency of that description was upheld in the *Lamb* case. While a majority of the court is of the opinion that the description in the notice of the sale was sufficient, appellants cannot prevail even assuming its insufficiency. Such a defect was cured by the decree of the Chancery Court confirming the sale.

This court held in *Stout* v. *Brown*, 64 Ark. 96, 40 S.W. 701, that a sale of attached property under a writ *venditioni exponas*, after it had been reported to and confirmed by the court, could not be collaterally attacked upon the ground that such writ did not specify the property to be sold, or that the officer sold without authority, or that he sold without giving the notice required by law. The *Stout* case was cited with approval in *Lambie* v. *W. T. Rawleigh Co.*, 178 Ark. 1019, 14 S.W. 2nd, 245. In the latter case *Cassady* v. *Norris*, 118 Ark. 449, 177 S.W. 10, was also discussed in this language: (at p. 1029) "The court further held that, after a confirmation of a sale has been made by order of the court, all defects and irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity." In *Glasscock* v. *Glasscock*, 98 Ark. 151, 135 S.W. 835, it was held that confirmation of a judicial sale of lands cures such irregularities as a failure to advertise the lands. See also *Files* v. *Harbison*, 29 Ark. 307, upholding a judicial sale of lands against a collateral attack, where part of the lands had been omitted from the notice of sale.

Appellants have also sought to bring themselves within the rule announced by this court in such cases as *Word, Receiver* v. *Grigsby*, 206 Ark. 164, 174 S.W. 2d, 439, and

Schuman v. *Person*, 216 Ark. 732, 227 S.W. 2d, 160. It is argued that James H. Stith sought to redeem the lots in question, but was prevented from doing so by the mistake or neglect of the official to whom he tried to pay the delinquent assessment. To establish this allegation in their complaint, appellants introduced in evidence two redemption certificates issued to the Homeowners Loan Corporation, which held a mortgage on the property. One certificate was issued in 1934 covering delinquencies for several previous years; the other was issued in 1938 for delinquent 1937 assessment. No other proof was offered on this issue. Mere proof of two redemptions on other occasions certainly did not prove that as to 1934 delinquency, James H. Stith attempted in good faith to pay his taxes and was only prevented from doing so by official misprision.

Even though the foreclosure sale was valid, James H. Stith and his heirs had five years from the date of the sale on March 16, 1938 in which to redeem the property. Ark. Stats. 1947. Secs. 20-446, 20-1144. The record does not disclose that they made any effort to do so.

We will not discuss at length appellants' allegation that Pinkert's title was acquired through fraud and collusion. Suffice it to say there is no proof whatever to sustain such allegations.

All other arguments of appellants have been considered and are deemed to be without merit.

The decree is affirmed.

APPENDIX "B"

IN THE SUPREME COURT OF ARKANSAS

No. 9297

HERBERT STITH, ET AL, Appellants

VS.

ED PINKERT, ET AL, Appellees

MOTION TO REHEAR

Come the appellants and move the court to set aside the decree herein rendered affirming the decision of the Pulaski Chancery Court and to grant the appellants a rehearing, and for all other proper and equitable relief, and for cause for rehearing the appellants allege that the court erred in their rulings of the law as hereinafter set out, and that the court overlooked the facts as hereinafter set out.

1. The court erred in holding that appellants were barred under the rule of stare decisis and by said error the court's holding is in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. Appellants did not have their day in court and this court's ruling that they are barred under the rule of stare decisis constitutes the taking of appellants lands without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States.

2. The court erred in holding that Act 207 of 1937 of the General Assembly of Arkansas did not violate the due process clause of the 5th and 14th Amendments to the Constitution of the United States; said holding of this court that the incorrect allegation of ownership and not making the true owner a party to the proceedings, under Act 207 of 1937 in municipal improvement district foreclosure proceedings, is immaterial, is in violation of the due process clause of the 5th and

14th Amendments to the Constitution of the United States, James H. Stith, the true owner and last owner of record, not having been made a party to the proceedings wherein Sewer Improvement District 94 foreclosed and sold his lands, thus not having his day in court.

3. The court erred in holding Act 207 of 1937 applicable to the case at bar since the foreclosure suit was pending at the time of the passage of said Act by the legislature; said Act 207 changed the law existing at its passage from a proceeding quasi in personam to a proceeding strictly in rem; and the holding of this court that said Act 207 of 1937 applied to the case at bar is in violation of the due process clause of the Constitution of the United States under the 5th and 14th Amendments to same in that it takes appellants land without due process of law. James H. Stith not having notice of said proceedings in said foreclosure suit.

4. James H. Stith not having been made a party to the proceedings, wherein Sewer Improvement District 94 foreclosed and sold his lands, and having no notice of same, did not have his day in court and said proceedings took his land without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States; and the court erred in holding that it was unnecessary that the owner be made a party to such proceedings and that notice to "SMITH" was notice to "STITH" and the court further erred in holding that same did not violate the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

5. The notice of the sale of the lands involved herein did not sufficiently describe the lands and did not show the name of the owner thereof and did n. t constitute notice at all that the lands of James H. Stith were to be sold. The court erred in holding that such want of notice was cured by confirmation of the sale; said want of notice and the holding of this court as to same both constitute the taking of appellants land without due

process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

6. The sale of the lands involved herein by Sewer Improvement District 94, through the Commissioner appointed to make said sale, after a redemption certificate had been issued, which due to the carelessness and negligence or misprision of the clerk in leaving out the tax due for the year 1934, said redemption certificate having been issued during the period of redemption and said redemption or partial redemption having been made in good faith under the belief that same was for all the taxes due on said lands, constituted the taking of appellants lands without due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States. This court erred in holding that the record did not disclose any effort to redeem said lands and by said holding appellants lands were taken in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

7. The court overlooked the fact that there was no written assignment of the certificate of purchase from Jack Barry to W. I. Stout, Trustee and that W. I. Stout, Trustee acquired no title because a deed based upon an oral assignment (if any) is void as being in violation of the statute of frauds. Said deed to W. I. Stout, Trustee, being based upon an oral assignment of owning the certificate of purchase, there being no written assignment of same at all, being in violation of the Statute of Frauds and the courts upholding same by overlooking these facts constituted the taking of appellants lands in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

8. The court erred in construing Act 207 of 1937 of the general Assembly of Arkansas and the court overlooked the rules of statutory construction in construing said Act 207 of 1937 without considering the

prior laws on the same express subject and which have not been repealed, to determine the intention of the legislature in passing said Act 207 of 1937; and by overlooking the rules of statutory construction and thus by not considering aforesaid prior laws, namely Act 85 of 1925, Crawford and Moses Digest, Sections 5677, 5678, 5679 and 5700 inclusive, along with Act 207 of 1937, this court by such error upheld the taking of appellants land without due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States; appellants' father, James H. Stith, never having had his day in court and never having any notice of the foreclosure proceedings wherein his land was sold. The court by said errors in construing Act 207 of 1937 took the lands of appellants without due process of law in violation of the due process clause of the 5th and 14th Amendments to the Constitution of the United States.

I, Tilghman E. Dixon, one of the Attorneys for the appellants, state that I have read and studied the opinion carefully and have re-read the transcript and verily believe that the court in its rulings of law overlooked the facts mentioned and this Motion is not filed for the purpose of delay, and that the judgment should be set aside and a rehearing had, and respectfully so pray.

Respectfully submitted,

(signed) TILGHMAN E. DIXON.

SUPREME COURT OF ARKANSAS

November Term, 1950

December 11, 1950

REHEARING PETITIONS DENIED: Being fully advised, the petitions for rehearing in the following causes are by the Court severally overruled: * * * 9297—Herbert Stith, et al, Appellants vs Ed Pinkert, et al Appelles; * * *

APPENDIX "C"

PULASKI CHANCERY COURT

No. 87577

HERBERT STITH, ET AL, Plaintiffs,

vs.

ED PINKERT, ET AL, Defendants.

DECREE

On this day came on for hearing the above entitled cause, the plaintiffs appearing by their attorneys, Tilghman E. Dixon and J. R. Booker; the defendants Ed Pinkert and Manie Schuman appearing by their attorney U. A. Gentry; and the defendants Robert W. Griffith, Jr., W. I. Stout, Ella Stith, L. E. Ellenbogen and Louis C. Cohen, d/b/a Elco Agency, and Board of Improvement of Sewer Improvement District No. 94 of the City of Little Rock, Arkansas came not, neither did they answer, plead or demur; and this cause is submitted to the Court upon the complaint of plaintiffs and the demurrer thereto on the part of Ed Pinkert and Manie Schuman; the separate answer of Ed Pinkert and Manie Schuman; the reply of plaintiffs to the answer of the defendants Ed Pinkert and Manie Schuman; the depositions of the plaintiffs Herbert Stith, James H. Stith, Jr., and Melanie Stith Taylor; the testimony of Frank Kell, W. A. Johnson and L. C. Cockman, witnesses for the plaintiffs, taken orally before the Court (which testimony was committed to writing by the official court reporter and is hereby ordered to be transcribed and filed as a part of the record in this cause); certified and exemplified records introduced as exhibits; and the Court being well and sufficiently advised as to the matters of fact and law arising herein, doth find the issues in favor of the defendants.

The Court finds that all right, title and interest of the plaintiffs in and to the West Half of Lots One (1), Two (2), Three (3), Four (4), Five (5) and Six (6), Block

Eight (8), Adams Addition to the City of Little Rock, Arkansas, were vested in Sewer Improvement District No. 94 of the City of Little Rock, Arkansas by virtue of a foreclosure decree and sale in the case of Board of Commissioners of Sewer Improvement District No. 94 vs. S. R. Thomas, et al. (No. 37177) in the Chancery Court of Pulaski County, Arkansas, (the property not having been redeemed within the time provided by law), and that the defendant herein Ed Pinkert, is now the owner of said property through mesne conveyances from said improvement district. Plaintiffs' cause of action is therefore without equity and should be dismissed.

It Is Therefore considered, ordered, adjudged and decreed that plaintiffs' complaint be dismissed for want of equity, and that the defendants Ed Pinkert and Manie Schuman have judgment for all their costs herein expended, for which execution may issue as upon a judgment at law.

Plaintiffs except to the findings and decree of the Court and pray an appeal to the Supreme Court of Arkansas, which is granted.

FRANK H. DODGE,
Chancellor.

Date: May 4, 1950.

O K as to form, Tilghman E. Dixon, U. A. Gentry.

(Filing stamp: "May 4, 1950".)

APPENDIX "D"

ACTS OF ARKANSAS, 1937

Page 758.

Act 207

An act to amend and supplement the law governing the foreclosure of liens for assessments due in municipal improvement districts, and other purposes.

Be it Enacted by the General Assembly of the State of Arkansas:

Section 1. That any assessment, or annual installment thereof, levied by a Municipal improvement district shall not be paid within the time provided by the City Ordinance approving such assessment, the said collector shall add thereto a penalty of ten per centum, and shall at once return a list of all the property within such improvement district on which the assessment, or installment, has not been paid to the board of improvement as delinquent.

Section 2. On receipt of such delinquent list the board of commissioners shall enforce collection of such past due assessments by proceedings in the Chancery Court of the County in which said improvement district is situated; and said court shall give judgment against said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way, for the amount of such taxes or assessments, together with the penalty and interest on same, attorneys fees and costs of the proceedings. Such judgment shall provide for the sale of said delinquent lands by a commissioner of the court, after advertisement hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings in rem, and it shall be immaterial that the ownership of the said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant. In listing said lots, blocks, or parcels of land, railroad tracks and right-of-way, the property may be shown as a single improvement; that is, if a building occupies more than one lot or tract of land, the property may be listed together on one line.

Section 3. All of the delinquent property in such improvement district may and should be included in one suit, and such suit may cover more than one past due installment. The warning order or notice of the pendency of such suit shall be given by publication weekly for four weeks before judgment is entered for the sale of said lands, lots, blocks, or parcels of land, railroad tracks and right-of-way, in some newspaper published in the county where such suits

may be pending, which warning order or notice may be in the following terms:

BOARD OF COMMISSIONERS, (and name of improvement district)

Plaintiff

vs.

DELINQUENT LANDS, LOTS, BLOCKS, OR PARCELS OF LAND, AND RAILROAD TRACKS AND RIGHT-OF-WAY, IN SAID DISTRICT,

Defendants

All persons, firms, or corporations having or claiming an interest in any of the following described lands, lots, blocks, or parcels of land, railroad tracks and right-of-way, are hereby notified and warned that suit is pending in the Chancery Court of ..... County, Arkansas, to enforce the collection of certain ..... taxes or assessments on the subjoined list of lands, each supposed owner having been set opposite his or her or its lands, together with the amounts severally due from each, to-wit:

(Then shall follow a list of supposed owners, with a description of each separate property that is delinquent, and amount due thereon respectively as aforesaid), and said warning order or notice may conclude in the following form:

All persons, firms and corporations interested in any of said property are hereby warned and notified that they are required by law to appear within four weeks and make defense to said suit, or the same will be taken for confessed and final judgment will be entered directing the sale of said lands for the purpose of collecting said taxes or assessments, together with the payment of interest, penalty, attorney's fee and costs adjudged against each tract.

— —,

Clerk of said Court.

Section 4. And said suit shall stand for trial at the first term of court, or adjourned day of court, after the complaint may be filed, if said four weeks shall expire either be-

fore the first day of the term, or during the term of court to which said suits are brought respectively, unless a continuance be granted for good cause shown, within the discretion of the court, and such continuance, for good cause shown, may be granted as to a part of said lands or defendants without affecting the duty of the court to dispose finally of the others as to whom no continuance may be granted; and in all cases where notice has been properly given as aforesaid, and where no answer has been filed, or, if filed, and the cause decided for the plaintiff, the court by its decree, shall grant the relief as prayed for in the complaint, and shall direct said commissioner to sell the lands, lots, blocks, or parcels of land, railroad tracks and right-of-way described in the complaint at the courthouse door of the county wherein the decree is entered, at public outcry, to the highest and best bidder, for cash in hand, after having first advertised such sale (such advertisement may include all the different properties described in the decree) for two weeks, consecutively, in some newspaper published in the county, or if there be no such newspaper such advertisement may be published in some newspaper published in an adjoining county; and if all the lands, lots, blocks, or parcels of land, railroad tracks and right-of-way be not sold on the day as advertised, such sale shall continue from day to day until completed; and such commissioner shall by proper deed convey to the purchaser the lands, lots, blocks, or parcels of land, railroad tracks and right-of-way so sold, and the title to such property shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and to insane persons having no guardian or curators, the right they now have by law to appear and except to said proceedings within three years after their disabilities are removed.

Section 5. At such sale if there be no purchaser offering as much as the total tax or assessment, plus penalty, interest and all costs and attorney fees allowed, then said property shall be struck off to the plaintiff.

Section 6. Any person, firm or corporation having an interest in any property sold, may redeem the same as now required by law, provided that the Chancery Clerk in

writing up the certificate of redemption shall not charge and receive more than fifty cents for one separate call of property as listed and sold, and the sum of twenty-five cents for each additional call or description of property which the person, firm or corporation so redeeming may require to be redeemed and placed on said certificate.

Section 7. When the suit with the delinquent list is filed in the Chancery Court, the delinquent list of property shall be copied into a permanent record of delinquent lands, and the clerk shall receive as part of his costs the sum of ten cents for each separate line of description of property, which amount shall be paid by the plaintiff when the suit is filed, and shall be taxed and collected as part of the costs and refunded to the plaintiff. On said record of delinquent lands the clerk shall note all redemptions made prior to date of sale; also shall note on said record the redemption of lands after said sale, first recording after the description of each piece of property to whom it was sold or if sold to the plaintiff.

Section 8. This act is intended to supplement the laws now in force relative to foreclosure of assessment liens in municipal improvement districts, and the service by notice as herein provided shall be just as effective and binding on the property as though service was had under Section 5677 and 5679 of Crawford and Moses Digest of the Statutes of Arkansas.

Section 9. This act is declared to be severable and if any part hereof should be invalid it shall not affect the remainder of this Act. This Act is to be cumulative and shall repeal only those acts in direct conflict herewith.

Section 10. Whereas, the present method of foreclosing liens for past due assessments in municipal improvement districts is unduly costly and expensive to the property owners and to the Districts, an emergency is declared, and this Act is necessary for the preservation of the public peace, health and safety; an emergency is hereby declared to exist and this Act shall take effect and be in full force from and after its passage.

Approved: March 8, 1937.

ACTS OF ARKANSAS, 1925

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Act 85

Section 1. All taxes or assessments not now delinquent but now or hereafter levied on the real property of this state in any road improvement district, fencing district, levee district, bridge district, drainage district, sewer district, street improvement district, side walk district, water district, light district, gas district, or any other district, now or hereafter organized for the purpose of making any character of improvement authorized by law, whether said district be situated within the corporate limits of a city or town, or otherwise, if not paid within the time provided for the payment thereof, shall be delinquent, and the city collector, town collector, or any other person by whatever official title known (except the ex officio collector of the county where such property is situated) having in his custody or possession tax books for the purpose of collecting the taxes in any such district, shall, within sixty (60) days after any such delinquency, make out and file with the clerk of the Chancery court of the county in which said property is situated, upon a form to be approved by the said Chancery clerk, a list of all such real property of such county hereafter becoming delinquent. Provided, that the ex-officio collector of the county shall, in all respects, be subject to and shall comply with the provisions of this act except that he shall file with the Chancery clerk the delinquent list or lists required by this act within (100) one hundred days from the date such taxes become delinquent in his office. Said list shall be preceded with a caption, which may be in substance, as follows:

"The lands, town lots, railroads, tram roads, bridges and other property returned delinquent in ..... (stating the corporate name of the district) for the non-payment of taxes due said district for the year 19.. with the tax chargeable thereon, are contained and described in the following list:"

The said list shall include the name of the supposed owner as the same appears on the tax books, a description of the property, and the amount of tax due thereon, to which list the said collector shall append his affidavit that the same are true and correct, and said affidavit shall also state the time the said list became delinquent. The taxes shown delinquent by the said list shall be designated as the delinquent taxes for the year in which the same became payable. A separate list shall be made for each improvement district, and on the margin of said lists provision shall be made for the extension of penalty and cost and for the redemption of said property.

Section 6. When the board of commissioners, or any one authorized by law to file suit for the collection of such delinquent taxes desire to commence said suit, they shall obtain a certified copy of the remaining delinquent property on said list from the clerk which shall be filed with the complaint, or within ten days thereafter, and taken as part thereof. And the clerk for making said list shall be entitled to ten cents a tract payable in advance which shall be taxed as costs in said suit.

Provided, that the Chancery court of said county, by proper order in such case, may permit the clerk to furnish said list to said board of commissioners, or anyone authorized by law to file suit for the collection of such delinquent taxes, without requiring payment in advance, but in such event the clerk's fees for making and certifying such list shall be taxed as costs in the case, and become payable out of any fund collected from such delinquent property.

No suit for the collection of such delinquent taxes shall be brought after three years from the date such taxes become delinquent.

(the other portions of Act 85 of 1925 are omitted solely for the reason that they have no bearing at all on the questions involved in this appeal)

CRAWFORD AND MOSES DIGEST OF THE STATUTES OF ARKANSAS

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Section 5677. Name of last owner. In suits to foreclose the liens of assessments upon property in such improvement

districts the name of the last owner of the property as it appears in the recorders office shall always be given as the owner, and such party shall be made defendant, unless the commissioners know that some other party has acquired title; in which event such actual owner shall be made defendant. Act March 3, 1913, p. 527, # 4.

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Section 5678. Default decree. Summons shall be issued, and the defendant shall be required to appear and respond within five days after service; and upon default a decree shall be rendered against such property for the amount of such assessment, penalty and costs and an attorney's fee. Act March 22, 1881, p. 161, # 10.

Section 5679. Constructive service. If the sheriff, or other officer, to whom the writ may be directed, shall return that the defendant is not to be found in his county, or if the owner is stated in the complaint to be unknown, service shall be made by affixing a copy of the summons to the property assessed, or to some part thereof, for fifteen days, and by publishing a copy of the summons in some daily or weekly paper, published in the city, for one insertion, and the cause shall be made ready for hearing within fifteen days after such publication, and a decree shall be rendered as in case of actual service. Id. #10.

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Section 5700. Terms of sale. All sales shall be for cash, and to the highest legal bidder. If sales are not completed on the first day, the commissioner shall continue the same day to day until completed. In other respects such sales shall be governed by the rules and laws regulating other sales of land made under decrees in chancery, and with like notice. Id. # 25.

Amendment 5

(Criminal actions—Provisions concerning—Due process of law and just compensation clauses)—No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14

Section 1. (Citizenship—Due process of law—Equal protection)—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.